No. 92-1064

FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

ROBERT E. ANDERSON and BONNIE DeLILLIE,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the *Feres* doctrine should be overruled, to allow a U.S. Marine to bring an action against the government under the Federal Tort Claims Act, for medical malpractice committed while the Marine was on leave from active duty, and being treated in an Air Force hospital for an ailment unrelated to military service?

2. Whether the *Feres* doctrine should be overruled, so that the parent of a U.S. Marine may bring an action against the government under the Federal Tort Claims Act for the loss of the Marine's society and services resulting from medical malpractice as described above?

LIST OF PARTIES

The names of all parties to this proceeding appear in the caption of the case.

TABLE OF CONTENTS

Questions Presented for Review..... i

List of Parties..... ii

Table of Authorities..... iv

Reports and Opinions Below..... vi

Statement of Jurisdiction..... vii

Statutory Provisions Involved..... viii

Statement of the Case..... 1

Argument for Granting the Writ..... 3

Appendix A - Opinion of the Court of Appeals

Appendix B - Opinion of the District Court

TABLE OF AUTHORITIES

CASES:

Ahrens v. Clark,
335 U.S. 188 (1948) 6

Andrews v. Louisville & N.R.R.,
406 U.S. 320 (1972) 6

Boys Markets, Inc. v. Retail Clerks Union Local 770,
398 U.S. 235 (1970) 6

Braden v. 30th Judicial Circuit Court of Ky.,
410 U.S. 484 (1973) 6

Continental T.V., Inc. v. GTE Sylvania, Inc.,
433 U.S. 36 (1977) 6

Feres v. United States,
340 U.S. 135 (1950) 2, 3, 4, 6, 7, 8

Indian Towing Co. v. United States,
350 U.S. 61 (1955) 5

International Union v. Wisconsin Employment Rel. Bd.,
336 U.S. 245 (1949) 6

Johnson v. Transp. Agency, Santa Clara Cty., Cal.,
480 U.S. 616 (1987) 8

Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n,
427 U.S. 132 (1976) 6

Monell v. New York City Dept. of Social Services.,
436 U.S. 658 (1978) 6, 7

Monroe v. Pape,
365 U.S. 167 (1961) 6,7

Moore v. Illinois Cent. R.R.,
312 U.S. 630 (1941) 6

Rayonier, Inc. v. United States,
352 U.S. 315 (1957) 5

Sinclair Refining Co. v. Atkinson,
370 U.S. 195 (1962) 6

United States v. Arnold, Schwinn & Co.,
388 U.S. 365 (1967) 6

United States v. Brown,
348 U.S. 110 (1954) 5

United States v. Johnson,
481 U.S. 681 (1987) 3, 4

United States v. Muniz,
374 U.S. 150 (1963) 5

United States v. Shearer,
473 U.S. 52 (1985) 5

STATUTES:

28 U.S.C. § 1254 vi

28 U.S.C. § 1346(b) vii, 1, 3

38 U.S.C. §§ 301, et seq. 5

OTHER AUTHORITIES:

Eskridge, *Overruling Statutory Precedents*,
76 Geo. L.J. 1361 (1988) 7

REPORTS AND OPINIONS BELOW

Anderson v. United States, No. 91-16932, Memorandum Decision, 9th Circuit Court of Appeals, September 18, 1992.

Anderson v. United States, No. CIV 90-1694-PHX-SMM, Unpublished Order, District of Arizona, November 21, 1991.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 18, 1992. This Court has jurisdiction to review this matter pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

28 U.S.C., Subsection 1346(b)

> Subject to the provisions of chapter 171 of this title (28 U.S.C., Subsection 2671, et seq.), the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States for money damages, accruing on and after January 1, 1945, for injury or loss to property, or personal injury or death caused by the negligence or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, as a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

STATEMENT OF THE CASE

I. Facts

Petitioner Robert Anderson will never eat a normal meal again. In May, 1988, government health care providers failed to timely diagnose that he had a bowel obstruction, and as a result gangrene set in. His entire small intestine had to be surgically removed. For the rest of his life Robert will take his nutrition through a tube inserted into a vein.

At the time in question, Robert was a lance corporal in the United States Marine Corps. He was on leave visiting Phoenix, Arizona, away from his active duty station at Camp Pendleton, California. While in Arizona he suffered abdominal pain, and presented himself to the health care facility at Luke Air Force Base near Phoenix, where the alleged medical malpractice occurred.

II. History of the case

A. Jurisdiction of the District Court

Petitioners invoked the jurisdiction of the District Court pursuant to 28 U.S.C. § 1346(b), claiming damages against the United States as authorized by the Federal Tort Claims Act.

B. In the District Court

Robert filed suit against the government in the United States District Court for the District of Arizona on October 31, 1990, for medical malpractice. The complaint was later amended to add the derivative claim of his mother, Petitioner DeLillie, for loss of the society and services of her son. The government moved to dismiss the

claims of Petitioners for lack of subject matter jurisdiction, based on the *Feres* doctrine[1]. On November 21, 1991, the District Court granted the government's motion and entered an order dismissing the case.

C. In the Court of Appeals

On December 9, 1991, Petitioners filed a Notice of Appeal to the United States Court of Appeal for the Ninth Circuit. Following briefing, the Court of Appeals affirmed the judgment of the District Court by a memorandum opinion filed on September 18, 1992.

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[1] *Feres v. United States*, 340 U.S. 135 (1950).

ARGUMENT FOR GRANTING THE WRIT

I. INTRODUCTION

In 1946 Congress substantially abrogated the sovereign immunity of the United States by enacting the Federal Tort Claims Act (FTCA)[2], thereby opening the courthouse door to those injured by the federal government's tortious conduct. Four years later this Court shut the door to military personnel. In *Feres v. United States*[3] the Court surmised, despite the apparent language of the FTCA to the contrary, that Congress had not really intended to allow damage claims by members of the military for injuries suffered "incident to service."[4]

The *Feres* doctrine, the only judicially created exception to the FTCA's waiver of immunity, has been widely criticized, nowhere more cogently than in the dissent to *United States v. Johnson*[5], the most recent case in which the Court considered the extent of *Feres*'s re-immunization of the government. The aggrieved parties in *Johnson* did not ask the Court to overrule *Feres*.[6] These Petitioners now ask the Court to do so.

II. THE *FERES* DOCTRINE IS WRONG.

The plain language of the FTCA allows claims by servicemembers. Nothing in the legislative history of the Act shows that Congress intended to discriminate on the

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[2] 28 U.S.C. § 1346(b).

[3] 340 U.S. 135 (1950).

[4] *Feres*, 340 U.S. at 146.

[5] 481 U.S. 681, 692-703 (1987).

[6] *Johnson*, 481 U.S. at 692.

basis of uniform. Indeed, the *Feres* Court conceded that Congress had considered earlier tort claims bills that explicitly denied recovery to members of the armed forces, but did not include such an exception in the FTCA.[7]

Nevertheless, the Court decided to read claims by military members out of the FTCA, so that it would "fit" with "the entire statutory system of remedies against the government."[8] The Court offered the following justifications for doing so:

1) Congress intended only to waive immunity where an analogous private liability existed, and the Court could find no private sector analog to a claim by a soldier against the government;[9]

2) Congress could not have intended to subject injured members of the military to the vagaries of state tort laws, or to submit the "distinctively federal" relationship between a soldier and the military to other than federal authority;[10] and

3) Congress had provided other benefits to injured service personnel, yet the FTCA did not provide for any adjustment for these other benefits, so Congress could not have intended to allow FTCA claims in addition.

As is demonstrated in the *Johnson* dissent,[11] none of these justifications survives scrutiny. The Court later explicitly abandoned the first, the "parallel private liability"

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[7] *Feres*, 340 U.S. at 139.

[8] *Feres*, 340 U.S. at 139.

[9] *Feres*, 340 U.S at 141.

[10] *Feres*, 340 U.S. at 143-144.

[11] 481 U.S. at 692-703.

rationale.[12] The Court now considers the second - the "distinctively federal relationship" rationale - "no longer controlling."[13] And the Court ignored the third - the exclusive remedy rationale - when it allowed military personnel to recover under both the Veterans' Benefits Act[14] and the FTCA, without any offset.[15]

Later, the Court adopted an additional justification: suits by military personnel would interfere with military discipline.[16] This gives rise to the irony that if Corporal Anderson had been a prisoner in a federal penitentiary instead of a Marine on active duty in service to his country, and had been injured by the malpractice of a prison doctor, he would be free to pursue a claim under the FTCA. In *United States v. Muniz*, despite the government's contention that prison discipline would be disrupted, the Court refused to bar federal prisoners' malpractice claims because Congress had not explicitly precluded them in the FTCA.[17] What rational policy requires the Court to read the FTCA any differently when considering Corporal Anderson's claim? His case raises no issue that would involve the courts in second-guessing military judgment or tampering with the disciplinary structure of the armed forces.

Unfortunately, this case is not unique. The federal

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[12] *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957); *Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

[13] *United States v. Shearer*, 473 U.S. 52, at 58, note 4 (1985).

[14] 38 U.S.C. §§ 301 et seq.

[15] *United States v. Brown*, 348 U.S. 110 (1954).

[16] *United States v. Brown*, 348 U.S. at 112.

[17] 374 U.S. 150 (1963).

reporters are replete with *Feres* horror stories, and the lower courts continually complain of the unjust results that *Feres* forces them to impose on servicemembers and their families. In deciding this case the Ninth Circuit judges observed, "we follow a long tradition of reluctantly acknowledging the enormous breadth of a troubled doctrine."[18]

The *Feres* doctrine, without any visible means of support in principle, nevertheless remains suspended in place by *stare decisis*.

III. *STARE DECISIS* CONSIDERATIONS SHOULD NOT PREVENT CORRECTION OF THE *FERES* ERROR.

Petitioners understand that, for sound reasons, the Court is generally reluctant to overrule its earlier statutory interpretations. Yet there is ample precedent for overruling statutory precedent.[19] According to one commentator, as of 1988, the Court "has overruled or

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[18] Appendix A-3, quoting *Persons v. United States*, 925 F.2d at 295 (9th Cir. 1991).

[19] See, e.g., *Monell v. New York City Dept. of Social Services.*, 436 U.S. 658 (1978) [overruling *Monroe v. Pape*, 365 U.S. 167 (1961)]; *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) [overruling *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)]; *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) [overruling *International Union v. Wisconsin Employment Relations Bd.*, 336 U.S. 245 (1949)]; *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973) [overruling *Ahrens v. Clark*, 335 U.S. 188 (1948)]; *Andrews v. Louisville & N.R.R.*, 406 U.S. 320 (1972) [overruling *Moore v. Illinois Cent. R.R.*, 312 U.S. 630 (1941)]; *Boys Markets, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235 (1970) [overruling *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962)].

materially modified statutory precedents more than eighty times since 1961."[20]

There are a number of compelling reasons for taking a fresh look at the *Feres* doctrine. First, a return to the plain meaning of the text of the FTCA will better foster those principles crucial to a constitutional system of government based on the rule of law: objectivity, predictability, certainty, coherence. It is not unfair, after viewing the profusion of cases interpreting, construing, criticizing, modifying, and extending *Feres*, to observe that the doctrine raised more questions than it has answered.

Second, as argued above, the *Feres* doctrine is clearly erroneous, and qualifies for overturning "even under the most stringent test for the propriety of overruling a statutory decision, "... 'that it appear beyond doubt ... that [the decision] misapprehended the meaning of the controlling provision.'"[21] Longevity alone should not preserve a precedent that is fundamentally flawed.

Third, *Feres* and its progeny represent a method of statutory interpretation that should be repudiated. The *Feres* Court itself was evidently uncertain of its decision, remarking that "if we misinterpret the Act, at least Congress possesses a ready remedy."[22] The majority in *United States v. Johnson*, *supra*, noted this remark and viewed the fact that Congress had not acted to amend the FTCA during the intervening four decades as a sign of

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[20] Eskridge, *Overruling Statutory Precedents*, 76 Geo. L.J. 1361 (1988).

[21] *Monell v. New York City Dept. of Social Services, supra*, 436 U.S. at 700, quoting *Monroe v. Pape, supra*, 365 U.S. at 192 (Harlan, J., concurring).

[22] *Feres*, 340 U.S. at 155.

Congressional approval of *Feres*. This is fallacious. If the Congress that passed the FTCA did indeed mean what it said, it does not follow that any subsequent Congress would necessarily be able or inclined to correct the Court's misinterpretation. As one member of the Court has observed, "This assumption, which frequently haunts our opinions, should be put to rest. ... I think we should admit that vindication by congressional inaction is a canard."[23]

IV. Conclusion

Despite Congressional inaction to correct *Feres*, the Court has the ability, and in the interest of justice, the obligation, to act. Petitioners request that their Petition be granted, so the Court can restore to military personnel the FTCA rights enjoyed by all others.

Respectfully submitted,

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[23] *Johnson v. Transp. Agency, Santa Clara Cty., Cal., 480 U.S. 616, at 671-672* (1987) (Scalia, J., dissenting, joined by Rehnquist, C.J.).

APPENDIX A

FILED SEPTEMBER 18, 1992
Cathy A. Catterson, Clerk, U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Robert E. Anderson, a single man; Bonnie DeLillie,	) No. 91-16932
Plaintiffs-Appellants,	) D.C. No. CV-90-01694-SMM
v.	)
United States of America	) MEMORANDUM*
Defendant-Appellee.	)

Appeal from the United States District Court
for the District of Arizona
Stephen M. McNamee, District Judge, Presiding

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Submitted September 15, 1992**

Before GOODWIN, D.W. NELSON, and REINHARDT, Circuit Judges.

Robert E. Anderson and Bonnie DeLillie appeal the district court's dismissal of their Federal Tort Claims Act ("FTCA"), 28 U.S.C. 1346, 2671, et seq., action for lack of subject matter jurisdiction. The district court found that Anderson, an active duty Marine at the time the cause of action allegedly arose, was barred from bringing his medical malpractice claim against the United States under the FTCA by the Feres doctrine. See Feres v. United States, 340 U.S. 135 (1950). The Court also found that DeLillie, Anderson's mother, could not maintain her action for the loss of the "society and service" of her son due to the alleged negligence of the United States because it was a derivative claim. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

On appeal, the appellants cite Persons v. United States, 925 F. 2d 292 (9th Cir. 1991) and United States v. Johnson, 481 U.S. 681 (1987), and "acknowledge that under the current state of the law the Feres doctrine bars their claims" because Anderson was in the military and the alleged malpractice occurred in a military hospital. Appellants, however, request that we overrule Feres, and follow the dissent in Johnson. See 481 U.S. at 692-703.

While the doctrine "has been criticized 'by countless courts and commentators' including this court, . . . the Feres doctrine remains the law of the land, and

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** The Panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

we must undertake to apply it." Estate of McCallister v. United States, 942 F.2d 1473, 1475-76 (9th Cir, 1991) (quoting Persons, 925 F.2d at 295). Accordingly, we affirm. "In doing so we follow a long tradition of reluctantly acknowledging the enormous breadth of a troubled doctrine." Id. at 1480

AFFIRMED.

APPENDIX B

FILED NOV 21 1991
RICHARD H. WEARE, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Robert E. Anderson,	)	
	)	
Plaintiff,	)	No. CIV 90-1694-PHX-SMM
	)	
vs.	)	
	)	
United States of America,	)	ORDER
	)	
Defendant.	)	
	)	

Defendant, the United States of America, filed a motion to dismiss for lack of subject matter jurisdiction, pursuant to 12(b)(1) Federal Rules of Civil Procedure. Oral argument was heard on September 16, 1991.

BACKGROUND

Plaintiff's complaint is brought under the Federal Tort Claims Act for medical malpractice. In 1988 Plaintiff was a United States Marine stationed at Camp Pendelton (sic), California. On approximately, May 28, 1988 Plaintiff was on leave visiting Arizona. While on leave, he suffered stomach problems and presented himself to the health care facility at Luke Air Force Base, Arizona for medical

treatment.

Plaintiff alleges that the medical staff who treated him at Luke Air Force Base rendered him "substandard medical care consisting of improper treatment, care diagnoses (sic) along with delayed and/or improper surgical intervention." Plaintiff also alleges that subsequent care provided by the medical personnel at Wilfred Hall, United States Air Force Medical Center, Lackland, Texas was substandard.

As a result, of the allegedly improper care and treatment rendered by these military health care professionals, Plaintiff's intestines were removed and he can only be fed by a nutrient solution known as hyperalimentation. Plaintiff also alleges that he suffers from serious emotional injury.

After oral argument the Court permitted Plaintiff to file an Amended Complaint adding Bonnie DeLillie, the mother of Plaintiff Robert E. Anderson. Bonnie DeLillie is claiming damages for the loss of the "society and service" of her son due to the alleged negligence of the Defendant. The additional briefing regarding Bonnie DeLillie's claims being completed, the Court is prepared to enter the following order regarding Defendant's motion to dismiss.

DISCUSSION

Relying on the Feres doctrine, the United States moves to dismiss Plaintiff's complaint for lack of subject matter jurisdiction. While the Federal Tort Claims Act "waives traditional sovereign immunity for the tortious conduct of any government employee, the Supreme Court has carved out an exception for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." Persons v. United States, 925

F.2d 292, 294 (9th Cir. 1991), quoting Feres, 340 U.S. 135, 146 (1950). This exception to the Federal Tort Claims Act has become known as the Feres doctrine.

The rationale behind the Feres doctrine is threefold: 1) The distinctly federal nature of the relationship between the government and members of its armed forces, which argues against subjecting the government to liability based on the fortuity of the situs of the injury; 2) the availability of alternative compensation systems; and 3) the fear of damaging the military disciplinary structure. Stencel Aero Eng'g. Corp. v. United States, 431 U.S. 666, 671-2 (1977).

In Persons, an off-duty Navy petty officer, Persons, presented himself to the Balboa Naval Hospital's emergency room. Persons had several deep slash marks on each of his wrists. Despite Persons' slash marks and distressed emotional state, medical personnel at the hospital failed to counsel him. Without ever being admitted he was released from the hospital. Three months later Persons committed suicide. The Ninth Circuit held that even though Persons was off-duty, the alleged malpractice occurred at a military facility and was "incident to service." Id. at 296. Therefore, the Feres doctrine barred his suit under the Federal Tort Claims Act. Id.

Thus, the Ninth Circuit has found that off-duty military personnel, using military services, do so as a result of their military status. Therefore, any tortious conduct related to use of such services is "incident to service" and recovery under the Federal Tort Claims Act is barred. See, Atkinson, 825 F. 2d 202 (barring suit by servicewoman alleging that negligent medical treatment caused her child to be stillborn); Veillete v. United States, 615 F.2d 505 (9th Cir. 1980)(wrongful death suit on behalf

of servicemen for alleged negligence by employees of Naval hospital barred, even though deceased was off-duty at the time of the accident). "This is especially true in cases alleging medical malpractice in a military facility." Persons, 925 F.2d at 296.

In the present case, it was Plaintiff's military status that permitted him to be treated at Luke Air Force Base. The Court finds no merit to Plaintiff's argument that he is not bound by the Feres doctrine because he was treated by an Air Force medical facility instead of a Marine medical facility. The branch which treated him is not critical to the Feres exception; rather, the critical fact is that Plaintiff was a member of the military armed services, which permitted him to be treated at a military facility. Because Plaintiff's alleged injuries arose out of activity incident to service, his claims under the Federal Tort Claims Act are barred and Defendant's motion to dismiss shall be granted.

Likewise, the mother's cause of action shall be dismissed. Her claims are "'derivative claims,' having their genesis in [Robert Anderson's] service related injuries." Persons, 925 F.2d at 292 (9th Cir. 1991) (dismissing claims by widow and child of serviceman for loss of consortium and failure to warn because such claims derived from a service-related death); see, Gaspard v. United States, 713 F.2d 1097 (5th Cir. 1983) (serviceman's wife's claim barred by Feres; DeFont v. United States, 453 F.2d 1239 (1st Cir.), cert. denied, 407 U.S. 910 (1972) (Feres doctrine bars claims by wife and children of dead serviceman for emotional distress).

IT IS THEREFORE ORDERED that Defendant's motion to dismiss is granted (DOC. #6)

DATED this 20th day of November, 1991.

/s/
Stephen M. McNamee
United States District Judge

Copies to all counsel